IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTERS ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY;

Petitioners,

v.

THE HONORABLE HUGH STUART, JUDGE, DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF NATIONAL BROADCASTING COMPANY, THE NEW YORK TIMES COMPANY, PHILADELPHIA NEWSPAPERS, INC., CHICAGO SUN-TIMES, CHICAGO DAILY NEWS, DOW JONES & COMPANY, INC., THE READER'S DIGEST ASSOCIATION, INC., PUBLIC BROADCASTING SERVICE, CBS INC., PARADE PUBLICATIONS, INC., HARTE-HANKS NEWSPAPERS, INC., AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, ASSOCIATED PRESS MANAGING EDITORS ASSOCIATION, NATIONAL ASSOCIATION OF BROADCASTERS, RADIO TELEVISION NEWS DIRECTORS ASSOCIATION AND NATIONAL NEWSPAPER ASSOCIATION AS *AMICI CURIAE*

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Opinions Below

The opinions of the County Court of Lincoln County, Nebraska, dated October 22, 1975, and the District Court of Lincoln County, Nebraska, dated October 27, 1975, are set forth at p. 1a and 9a.* The *per curiam* statement of the Nebraska Supreme Court issued on November 10, 1975 is set forth at p. 19a. The opinion of Mr. Justice Blackmun, dated November 13, 1975 is set forth at p. 21a. The Order of the Nebraska Supreme Court for Hearing and Order to Show Cause entered on November 18, 1975 is set forth at p. 29a. The opinion of Mr. Justice Blackmun dated November 20, 1975 is set forth at p. 35a. The majority and dissenting opinions of the Nebraska Supreme Court dated December 1, 1975 are set forth at p. 44a and are reported at 63 Neb. S.C.J. 783, —— N.W.2d ——. The Orders of this Court, dated December 8, 1975 and December 12, 1975, *inter alia,* granting the motion for petitioners to treat papers previously filed by them with this Court as a Petition for a Writ of Certiorari to the Supreme Court of Nebraska and granting said Petition are set forth at p. 70a and p. 71a. Except as indicated above, none of said opinions is thus far reported.

Jurisdiction

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1970).

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* All references to prior opinions in this brief are to the appropriate pages of the Appendix to the amended petition for certiorari.

Consent of the Parties

All the parties to this litigation, by their attorneys, have consented to the filing of this brief. Their consents are on file with the Clerk of this Court.

Question Presented

Whether, consistently with the First and Fourteenth Amendments, the press may be enjoined from publishing news with respect to pending criminal judicial proceedings.

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Statement

The facts and previous decisions in this case are detailed in the briefs of the parties and we restrict ourselves to a summary statement.

On or about October 18, 1975, six members of the Kellie family were allegedly murdered in their home at Sutherland, Nebraska, and one or more of the alleged murders were purportedly in connection with the perpetration of or attempt to perpetrate one or more sexual assaults.

On October 19, 1975, defendant Erwin Charles Simants was arrested by the Lincoln County Sheriff and later charged with six counts of murder in the first degree in the perpetration or attempted perpetration of one or more sexual assaults. At the arraignment hearing held before the County Court, several journalists were in attendance. Although a portion of the hearing was conducted openly, a part of the hearing was closed by the court to the press and the public.

The preliminary hearing was scheduled in the County Court of Lincoln County, Nebraska, at 9:00 A.M. on October 22 for a determination as to whether Simants should be bound over to the District Court of Lincoln County, Nebraska, on the charges set forth in the amended complaint. On October 21, the prosecution filed a motion with the County Court requesting that a restrictive order be entered by that court. The defense joined in the prosecution's request and also moved that the preliminary hearing be closed to the public and the press. The latter request was denied by the County Court and an open preliminary hearing was held on October 22 at which time testimony was taken from various witnesses.

One witness at the preliminary hearing was Dr. Miles Foster, a pathologist, who testified, *inter alia*, that all of the victims had been shot in the head and that he found evidence of sexual assault on one of the victims, a 10 year old girl.

Another witness was James Robert Boggs, a 13 year old nephew of the defendant, who testified as follows*:

> ". . . on Saturday night, October 18, 1975, defendant got a .22 caliber automatic rifle from the bedroom of James Robert Boggs' parents. That it was his impression that the defendant loaded said gun. That the defendant then told James Robert Boggs to keep the kids inside and don't tell anyone anything. That the defendant left the home for a period of approximately 10-15 minutes. That the defendant then returned to the home and set the rifle down in the kitchen. The defendant then sat down at a table and wrote something on a piece of paper. The defendant then went downstairs with the piece of paper. That the defendant then cleaned the rifle and put it back in the bedroom of his parents. That the defendant then told James Robert Boggs 'I shot the Kellies. I did not want to shoot David and them, but he came in.' Then the defendant told James Robert Boggs to call his grandma (Grace Simants), which he did. He then gave the phone to the defendant but did not hear the telephone conversation. James Robert Boggs then testified that the defendant

* The following quotations are from the affidavit of Kiley Armstrong, a journalist employed by the Associated Press, who attended the preliminary hearing. The affidavit was submitted to the Nebraska courts, is before this Court, and has not been disputed in any detail whatever by any of the parties to this litigation. (As of the filing of this brief, the Appendix has not been filed by the petitioners and no page citations thereto with respect to Ms. Armstrong's affidavit are consequently set forth herein.)

left the home and told him not to tell anyone. That later, James Robert Boggs' parents found a written note downstairs on a fan. James Robert Boggs then testified as to what his parents told him was on the note and that he stated that it said 'Don't cry. It was the only way.'"

Another witness at the preliminary hearing was Amos Simants, father of the defendant, who testified as follows:

". . . his wife received a phone call from the defendant, that at about 9:00 P.M. the defendant came to their home, that the defendant told him 'I beat the Kellies to death.' That Amos Simants then testified that he did not believe the defendant so he went to the Kellie's home to see for himself. That at the Kellie's home he saw two bodies on the floor and that there was blood on each of them and that he then called for an ambulance."

A Nebraska State Patrol Investigator named Terry Livengood testified at the preliminary hearing that:

". . . he went to the Boggs' home and took possession of a .22 caliber automatic rifle and note reading 'I am sorry. Do not cry. It was the only way.'"

Testimony was also given at the preliminary hearing by Lincoln County Sheriff Gordon D. Gilster that he:

"went to the Boggs' home, arrested the defendant at approximately 8:00 a.m. on Sunday morning, October 19, 1975, and took him into custody. He took the defendant to the jail and took a statement from the defendant. That he later took a second statement from the defendant and recorded it."

After the entry by the County Court on October 22 of an Order finding that "there is a reasonable likelihood of prejudicial news [coverage] which would make difficult, if not impossible, the impaneling of an impartial jury", the "news media" was enjoined from disseminating "any information" concerning the case "other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation." (1a, 2a).

On October 27, the District Court terminated the County Court's order and substituted its own. The District Court found "because of the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." The District Court adopted the aforementioned Nebraska Bar-Press Guidelines as "clarified" by the court in its order. The District Court ordered as follows:

1. It is hereby stated the trial of the case commences when a jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing, is "pre-trial" publicity.

2. It would appear that defendant has made a statement or confession to law enforcement officials and it is inappropriate to report the existence of such statement or the contents of it.

3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these wit-

nesses with reference to such statements in the preliminary hearing will not be reported.

4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at careful discretion of the press. The testimony of this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.

5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported.

6. The exact nature of the limitations of publicity as entered by this order will not be reported. That is to say, the fact of the entering of this order limiting pretrial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported." (10a-11a).

On October 31, petitioners sought relief from the District Court's order after having abided by the various orders of both the County and District Courts for nine days. Petitioners sought a stay from the District Court of its order and on the same day sought from the Supreme Court of Nebraska immediate relief, by way of mandamus, stay, and/or expedited appeal, from the District Court's order. Upon the failure of both the District Court and the Supreme Court of Nebraska to act on the requested relief, the petitioners filed an application on November 5 with this

Court (directed to Mr. Justice Blackmun, as Circuit Justice) which sought to stay the District Court's order.

On November 10, the Supreme Court of Nebraska issued a *per curiam* statement in which that court declined to take any action on the petitioners' writ of mandamus action pending before it until such time as this Court made known whether it would accept jurisdiction in the matter. (19a).

On November 13, Mr. Justice Blackmun, acting in his capacity as Circuit Justice, issued a chambers opinion in which he declined to act finally on the petitioner's application for stay of the District Court's order "[o]n the expectation, which I think is now clear and appropriate for me to have, that the Supreme Court of Nebraska, forthwith and without delay, will entertain the petitioners' application made to it, and will promptly decide it in the full consciousness that time is of the essence." (21a, 28a).

On November 18, the Nebraska Supreme Court set November 25 as the date on which it would hear petitioners' arguments on their request for mandamus and on the substantive questions surrounding the validity under the Constitution of the District Courts' order. The petitioners, pursuant to the November 13 ruling of Mr. Justice Blackmun, on November 18 renewed their application for a stay.

On November 20, Mr. Justice Blackmun granted petitioners a partial stay of the District Court's order after concluding that the Supreme Court of Nebraska's delay in rendering a definitive decision had exceeded "tolerable limits". (35a, 36a). Those portions of the outstanding prior restraints which Mr. Justice Blackmun declined to stay "at least on an application for a stay and at this distance" related to "certain facts that strongly implicate an accused" if "publicizing [those] facts will irreparably impair the

ability of those exposed to them to reach an independent and impartial judgment as to guilt." (40a, 41a).

On November 21, petitioners filed a motion with all Justices of this Court to vacate so much of Mr. Justice Blackmun's order dated November 20 as had not stayed the imposition upon the press of the prior restraint on publication.

On November 25, the Supreme Court of Nebraska heard oral argument upon the petitioners' request for a stay of the District Court's order. On December 1 the Nebraska Supreme Court issued a *per curiam* opinion (two judges dissenting on jurisdictional grounds and two others joining the remaining three solely to break what would otherwise have been a procedural deadlock). (44a). The Court held as follows:

> "We conclude that the order of the District Court of October 27, 1975, is void insofar as it incorporates the voluntary guidelines and in certain other respects in that it impinges too greatly upon freedom of the press. The guidelines were not intended to be contractual and cannot be enforced as if they were.
>
> "The order of the District Court of October 27, 1975, is vacated and is modified and reinstated in the following respects: It shall be effective only as to events which have occurred prior to the release of this opinion, and only as it applies to the relators herein, and only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interests made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to repre-

> sentatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings." (64a).

On December 4, petitioners applied to this Court for a stay of the order of the Supreme Court of Nebraska and further moved this Court to treat the previously filed papers as a Petition for a Writ of Certiorari. On December 8, this Court denied without prejudice the petitioners' motion dated November 21 which sought to vacate in part Mr. Justice Blackmun's stay order dated November 20 insofar as that order expired on December 1, the date of the Supreme Court of Nebraska's order. This Court granted petitioners' motion to treat the previously filed papers as a Petition for a Writ of Certiorari, consideration of which was deferred until additional papers were received by this Court or until the close of business on December 9; consideration was also deferred of the application for a stay of the order of the Supreme Court of Nebraska. (Justices Brennan, Stewart and Marshall would have granted the latter application.) (70a).

On December 12, 1975, this Court granted the Petition for a Writ of Certiorari; denied the motion to expedite (Justices Brennan, Stewart and Marshall dissenting); denied the application for a stay (Justices Brennan, Stewart and Marshall dissenting in whole; Justice White dissenting with respect to the publication of information disclosed in public at the preliminary hearing in the Simants case); and invited the submission of an Amended Petition for Certiorari, which was filed with the Court on December 24, 1975. (71a).

The jury in the Simants case was empaneled on January 8, 1976.

Interest of the *Amici*

The *amici* are publishers, broadcasters, journalists and associations thereof. National Broadcasting Company, Inc. operates television and radio networks and owns and operates television and radio stations. The New York Times Company publishes, *inter alia, The New York Times* and 13 newspapers in Florida and North Carolina. Philadelphia Newspapers, Inc. publishes *The Philadelphia Inquirer* and *The Philadelphia Daily News. The Chicago Sun-Times* and *The Chicago Daily News* are published by Field Enterprises, Inc. Dow Jones & Company publishes, *inter alia, The Wall Street Journal, Barron's National Business and Financial Weekly,* and *The National Observer.* The Reader's Digest Association, Inc. publishes *Reader's Digest* and is engaged in a number of other publishing activities. The Public Broadcasting Service is a non-profit membership corporation which manages the distribution of national public television programs to its 264 member stations. CBS Inc. operates television and radio networks and owns and operates television stations. Parade Publications, Inc. publishes *Parade Magazine,* a Sunday supplement distributed in 111 newspapers. Harte-Hanks Newspapers, Inc. publishes 47 daily and weekly newspapers in 9 states and owns and operates 2 television stations.

The American Society of Newspaper Editors is a nationwide professional organization of more than 750 persons holding positions as directing editors of daily newspapers throughout the United States. The Society of Professional Journalists, Sigma Delta Chi is the society of students and practitioners of journalism, with over 250 professional and student chapters and nearly 27,000 members. The Associated Press Managing Editors' Association is an association of the managing editors of newspapers throughout the

United States, large and small, which are members of the Associated Press. The National Association of Broadcasters is an association of radio and television broadcasters with a membership of 2479 AM radio stations, 1710 FM radio stations, five radio networks, 539 television stations and all commercial television networks. Radio Television News Directors Association includes approximately 1100 members who are active in the supervision, gathering, reporting and editing of news and other information of public affairs broadcast throughout the nation. National Newspaper Association is composed of approximately 6400 members each of which publishes either a daily or weekly newspaper.

A number of the *amici* have themselves been the subject of unsuccessful efforts to impose prior restraints upon the press. *E.g., United States* v. *Schiavo,* 504 F.2d 1 (3d Cir. 1974) (*en banc*), *cert. denied,* 419 U.S. 1096 (1975); *New York Times Co.* v. *United States,* 403 U.S. 713 (1971); *Community Hearing Aid Service, Inc.* v. *National Broadcasting Company,* Civ. No. C-75-117 (N.D. Ohio, 1975). *Cf. Oliver* v. *Postel,* 30 N.Y.2d 171, 331 N.Y.S.2d 407, 282 N.E.2d 306 (1972). All the *amici* believe that the protection of the press against prior restraints remains at the core of the First Amendment. It is that protection, more than any other, which insures both the independence and the freedom of the press. And it is that long-established and much reiterated protection which is now once again challenged—in this case by a decision of the Nebraska Supreme Court which actually asserts that the imposition of a prior restraint on the press is an "accommodation" of First and Sixth Amendment interests. (44a). The *amici* believe that the prior restraint imposed in this case threatens not only the ability of the press freely to report about criminal pro-

ceedings, but also their ability to report about all other matters. For that reason, the *amici* submit this brief to urge this Court to declare in unequivocal terms that prior restraints such as have been imposed in Nebraska are constitutionally prohibited.

Summary of Argument

What has so often been referred to as the "conflict" between free press and fair trial or—depending on the speaker—fair trial and free press is now squarely before this Court. It has served more than once as a topic for high school and college public speaking contests; it may well be a subject as to which more law review commentary has been devoted than any other*; and it is undoubtedly a subject as to which as much controversy exists and within the legal community as any other.

But real as the general controversy has been, it has rarely raged with respect to the specific and narrow issue before this Court: shall *prior restraints* be permitted against the press barring its publication of materials with respect to pending court proceedings? The negative response to that issue has generally been a given, a starting point for further discussion, or—at the very least—a conclusion reached before proceeding to other more difficult issues.

Thus, as a matter of precedent, this case is hardly a close one. The authorities of this Court, the virtually unanimous reported decisions of both state and federal courts, and a variety of reports of bar association and judicial committees have all repeatedly concluded that no

* See T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 459 (1970).

direct prior restraints are permissible on the press with respect to its news reporting about judicial proceedings.

Nonetheless, the prior restraint against publication in this case is not the first to issue in recent years. The *amici* believe that this is due, in good part, to three misconceptions with respect to prior decisions of this Court, misconceptions the *amici* urge this Court to deal with in its opinion in this case.

The first of these relates to the repeated articulation by this Court of the proposition that every prior restraint bears a "heavy presumption of invalidity"—a statement which led the Nebraska Supreme Court erroneously to conclude that this "presumption", like any other, might be overcome on an appropriate *ad hoc* showing of alleged need. The second of these relates to the nature of this Court's seminal decision in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), a decision the Nebraska Supreme Court erroneously construed to permit the imposition of direct prior restraints upon the press. The third relates to dictum of this Court in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), which was, the *amici* believe, also erroneously construed by the Nebraska Supreme Court to permit the issuance of the prior restraint here at issue.

ARGUMENT

So consistent are the authorities to the effect that, in Professor Bickel's words, "[p]rior restraints fall on speech with a brutality and a finality all their own" and that "it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech" * that prior restraints with respect to news reporting about judicial proceedings have almost invariably

* A.M. Bickel, THE MORALITY OF CONSENT 61 (1975).

been viewed as absolutely forbidden. This has generally been the case regardless of whose view was being articulated and what view he took of other issues such as the use of the contempt power against the press, such limitations as may be placed on the right of court personnel, attorneys and others to speak with the press, and the like.

Thus, in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), this Court, in the course of an opinion specifying a wide variety of actions open to a trial court to protect the right of a defendant to a fair trial, was explicit as to one type of judicial action which could not be employed: the placing of "any direct limitations on the freedom traditionally exercised by the news media. . . ." (384 U.S. at 350). Following *Sheppard*, four separate reports of judges and bar associations have considered the general subject of "free press —fair trial." In some respects they differed; but as to the illegality and lack of wisdom of *any* prior restraints on the press in its publication of materials with respect to pending judicial proceedings, they were in total agreement.

The first of the reports was that of the American Bar Association's Advisory Committee on Fair Trial and Free Press (1968), the Chairman of which was Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court. The Reardon Report was and is extremely controversial—particularly with respect to sections (which many in the press and elsewhere believe are unconstitutional) recommending the use of the contempt power in certain circumstances against the press.* But the Reardon Report was

* The contempt power set forth in section 4.1 of the Approved Draft, was, to the extent here relevant, to be used:

"(a) Against a person who, knowing that a criminal trial is in progress or that jury is being selected for such a trial:

(i) disseminates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case, that is wilfully designed by that person to affect the outcome of the trial." ABA Advisory Committee on Fair Trial and Free Press, Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press 13-14 (approved draft, March 1968).

clear in disavowing any "direct restrictions on the media." (*Id.* at 151).

Following the Reardon Report, a committee of The Association of the Bar of the City of New York chaired by Judge Harold R. Medina studied the subject and recommended, in its report on *Freedom of the Press and Fair Trial*, against any expanded use of the contempt power because it believed "that as a matter of both constitutional law and policy" any such expansion was "neither feasible nor wise. . . ." (*Id.* at 10-11). With respect to the rejection of the imposition of any prior restraints on press coverage of judicial proceedings contained in the Reardon Report, the Medina Report was in full agreement.

The next report was that submitted to the Judicial Conference of the United States by the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" issue, the chairman of which was Judge Irving Kaufman. 45 F.R.D. 391 (1968). That report concluded that "any direct curb or restraint on publication by the press of potentially prejudicial material . . . is both unwise as a matter of policy and poses serious constitutional problems" and could not be recommended.

The most recent Bar Association report is in complete accord with the three earlier reports. The revised draft of "Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press" was issued by the ABA Advisory Committee on Fair Trial and Free Press in November 1975. That draft is also controversial. By proposing the adoption of certain specified procedures prior

to the entry of any restrictive orders, it has led many in the press (including some of the *amici* submitting this brief) to express concern that the existence of such procedures could tend to encourage the imposition of restrictive orders and legitimatize those that are issued. Whatever the merits of that proposal, it is—like the reports before it—unequivocal in its rejection of the imposition of any direct restraints upon the media. As phrased by the Committee:

> "First by recommending the procedure for adoption of Standing Guidelines and Special Orders, the Committee wishes to stress that it does not intend to recommend or encourage the use of judicial restrictive orders. Further, given the apparent ever-increasing tension between the courts and the press in executing their respective functions, and the significant constitutional problems which may be raised by the issuance of certain restrictive orders, *the Committee specifically recommends against the issuance of any orders which would impose direct restraints on the press.* It is clear that the free flow of information concerning court business is important and necessary not only to the requirements of a free press and a fair and public trial, but the greater public understanding of the judicial function and the rule of law in our society." (Emphasis added)

See also, Roney, *The Bar Answers the Challenge*, 62 A.B.A.J. 64 (1976).

The conclusion of each of these reports that prior restraints cannot and should not issue against publication of news about judicial proceedings was consistent with virtually every reported decision in the area. The first two reported cases in this area both arose in California. In

both *In re Shortridge*, 99 Cal. 526, 34 P. 227 (1893), and *Dailey* v. *Superior Court*, 112 Cal. 94, 44 P. 458 (1896) prior restraints were sought and denied—in the first case against the publication of public court testimony and in the second against the performance of a play about a pending murder case. Since those rulings, the reported judicial decisions have held unconstitutional or otherwise void a wide variety of limits sought to be imposed on press coverage of the courts. See *Ex Parte Foster*, 44 Tex. Cr.R. 423, 71 S.W. 593 (1903) [order held illegal barring publication of public court testimony]; *Ex Parte McCormick*, 129 Tex. Cr.R. 457, 88 S.W.2d 104 (1935) [order held illegal barring publication of testimony introduced in open court]; *State* v. *Morrow*, 57 Ohio App. 30, 11 N.E.2d 273 (Summit Co. 1937) [order held illegal barring publication of names of grand jurors]; *Ithaca Journal News, Inc.* v. *City Court*, 58 Misc.2d 73, 294 N.Y.S.2d 558 (Sup.Ct. Tompkins Co. 1968) [order held illegal barring publication of names of youthful offenders]; *Phoenix Newspapers, Inc.* v. *Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966) [order held illegal barring publication of information introduced at habeas corpus hearing]; *Johnson* v. *Simpson*, 433 S.W.2d 644 (Ky. 1968) [order held illegal barring publication of names of witnesses who were juveniles]; *State* v. *Sperry*, 79 Wash.2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971) [order held illegal barring publication of information relating to proceedings at trial unless they occurred in the presence of a judge and jury]; *State ex rel. Miami Herald Publishing Co.* v. *Rose*, 271 So. 2d 483 (Fla. Ct.App. 2d Dist. 1972) [order held illegal barring publication of information about murder case except testimony presented in open court]; *Sun Co.* v. *Superior Court*, 29 Cal. App.3d 815, 105 Cal.Rptr. 873 (4th Dist. 1973) [order held illegal barring publication of names and addresses of incarcerated witnesses]; *Younger* v. *Smith*, 30 Cal.App.3d

138, 106 Cal. Rptr. 225 (2d Dist. 1973) [order held illegal barring publication of material "except as occur in open court"]; *United States* v. *Dickinson*, 465 F.2d 496 (5th Cir. 1972) [order held illegal barring publication of proceedings in open court]; *United States* v. *Columbia Broadcasting System, Inc.*, 497 F.2d 107 (5th Cir. 1974) [order held illegal barring publication, *inter alia*, of sketches of court proceedings]. *See also Oliver* v. *Postel*, 30 N.Y.2d 171, 331 N.Y.S.2d 407, 282 N.E.2d 306, (1972) [dictum]; *United States* v. *Schiavo*, 504 F.2d 1 (3rd Cir. 1974) (*en banc*), *cert. denied*, 419 U.S. 1096 (1975) [based on denial of due process to newspapers]; *Calley* v. *Callaway*, 519 F.2d 184 (5th Cir. 1975) [based on propriety of refusal of military court martial to limit publication by press].

As the diversity of the courts that have rendered these decisions indicates, let alone the unanimity of the bar association and judicial reports referred to above, it has generally been accepted that *no* prior restraints will pass constitutional muster in the area of reporting about judicial proceedings. Nonetheless, the Nebraska decision now before this Court is not the first to reach it in this area; it is, in fact, the third to come before this Court in two years—each decision involving a direct prior restraint on reporting with respect to judicial proceedings. *See Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301 (1974) [stay granted of restrictive order barring publication of, *inter alia*, testimony given in open pretrial hearing]; *Newspapers, Inc.* v. *Blackwell*, 421 U.S. 997 (1975) [stay denied of restrictive order barring publication of names of jurors.]* Moreover, other unreported decisions

* Mr. Justice Brennan and Mr. Justice White would have granted the stay; the Chief Justice and Mr. Justice Douglas did not participate. The only reported case in American history of which we are aware prior to *Blackwell* in which a prior restraint on reporting about court proceedings was not reversed on appeal was *Schuster*

have issued entering direct prior restraints on the publication of, for example, the change of a plea in open court,* any opinion as to guilt or innocence,** and a public jury verdict***.

While it is difficult to state with certainty why courts in recent years have begun to issue restraints on the press, despite the existence of the authorities previously referred to,**** we believe three repeatedly articulated misconcep-

v. *Bowen*, 347 F.Supp. 319 (D. Nevada 1972), *remanded with directions to vacate and dismiss as moot*, 496 F.2d 881 (9th Cir. 1974). *Schuster*, like *Blackwell*, involved a prior restraint on the publication of the names of jurors. It was upheld by the District Court on the ground—which we believe was plainly erroneous—that the entry of such an order could be considered a "legislative" as opposed to a "judicial" act of a court. On that basis, the district court ruled the publication was not a prior restraint. (347 F.Supp. at 320). On appeal, the Court of Appeals held the case moot, observing that there was no showing that the judge who had entered the order or any other judge in the state had ever entered a similar order or was likely to do so. (496 F.2d at 882).

* *State* v. *Payne*, No. 74-7F (Cir.Ct. Manatee Co. Fla., Apr. 4, 1974).

** *People* v. *Green*, Nos. I.28145F-I.28150 (San Francisco Mun. Ct. Dep't 19, May 9, 1974).

*** See, *Wood* v. *Goodson*, 253 Ark. 196, 485 S.W.2d 213 (1972).

**** One post-*Sheppard* study, based on interviews of prosecuting attorneys, indicates that newspapers and broadcasters have significantly curtailed the use of what is traditionally believed to be prejudicial materal. Gerald, "Press-Bar Relationships: Progress since *Sheppard* and *Reardon*," 47 Journalism Quarterly 223 (1970). We know of no study, however impressionistic, indicating that publication of such news has increased in recent years. In this respect, newspapers in 23 states are parties to a variety of press-bar "guidelines" by which the press has voluntarily agreed, *inter alia*, "generally" not to print certain material and to "carefully consider" the potential for prejudice of certain other material before publishing it. As of 1974, the states were the following: Arizona (1968), California (1970), Colorado (1969), Idaho (1969), Kentucky (1970), Massachusetts (1963), Minnesota (1968), Missouri (1968), Nebraska (1970), New Jersey (1972), New Mexico (1969), New York (1969), North Carolina (1966), North Dakota (1971), Oklahoma (1968), Oregon (1962), Pennsylvania (1971),

tions with respect to previous decisions of this Court bear some responsibility and we urge the Court to take this opportunity to deal with what we believe to be those misconceptions. They relate to the articulation by this Court of the "heavy presumption" doctrine in prior restraint cases; the decision of this Court in *Sheppard;* and the decision of the Court in *Branzburg* v. *Hayes,* 408 U.S. 665 (1972). We deal separately with each.

1. The "Heavy Presumption" Against Prior Restraints.

At the heart of the Nebraska Supreme Court opinion is the proposition that since this Court has more than once observed that any prior restraint bears a "heavy presumption of invalidity",* the intended implication was "that if there is only a presumption of unconstitutionality then there must be some circumstances under which prior restraints must be constitutional for otherwise there is no need for a mere presumption." (55a). This conclusion, while not entirely wrong, turns the prior restraint doctrine on its head. There is no doubt that there are "some circumstances" in which prior restraints have been held constitutional. But the fact that all prior restraints are "not unconstitutional *per se*", *Southeastern Promotions, Ltd.* v.

South Dakota (1971), Texas (1969), Utah (1969), Virginia (1971), Washington (1966), Wisconsin (1970). Not the least offensive passages in various of the opinions of the Nebraska courts are references to those "guidelines" as some form of concession by the press that it may never publish the material which it has merely promised to "carefully consider" before publishing. To say the very least, any use of such guidelines to support the entry of any prior restraint can only result in the collapse of these precariously constructed bridges between journalists and the bar.

* *See, e.g., New York Times Co.* v. *United States,* 403 U.S. 713 714, (1971); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971); *Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175, 181 (1968); *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963); *Near* v. *Minnesota,* 283 U.S. 697 (1931).

Conrad, 420 U.S. 546, 558 (1975) does not mean that there is to be a continuing *ad hoc* judicial balancing process as to whether particular prior restraints are or are not to be entered. In fact, as this Court made clear in *Southeastern Promotions,* "[i]n order to be held lawful" a prior restraint "first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints. . . ." (420 U.S. at 559)

With respect to prior restraints on the press, the "narrowly defined exceptions" on news reporting have thus far been limited to *one* area—that of national security. As summarized by Mr. Justice Brennan in *New York Times Co.* v. *United States,* 403 U.S. 713, 726 (1971):

> "Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation 'is at war,' *Schenck* v. *United States,* 249 U.S. 47, 52 (1919), during which time '[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and locations of troops,' *Near* v. *Minnesota,* 283 U.S. 697, 716 (1931)."

The absolute prohibition on prior restraints on news reporting by the press except in this one area is deeply rooted in American history. The First Amendment itself "developed directly out of attempts to license the press" and as Professor Emerson has written, "[n]othing in the growth of modern society has, thus far at least, appealed to the country as ground for altering the considerations which led to the elimination of prior restraint upon the press." Emerson, *The Doctrine of Prior Restraint,* 20

Law and Contemp. Prob. 648, 662 (1955). In a number of opinions prior and subsequent to *Near* v. *Minnesota,* 283 U.S. 697 (1931), the ban on prior restraints on publication was expressed as an absolute. See, *e.g., Patterson* v. *Colorado,* 205 U.S. 454, 462 (1907); *Grosjean* v. *American Press Co.,* 297 U.S. 233, 249 (1936); *Kunz* v. *New York,* 340, U.S. 290, 307 (1951) (Jackson, J. dissenting). In *dictum* in *Near,* a narrow exception in certain national security cases was adverted to; in *New York Times Co.* v. *United States, supra,* the same exception was discussed; in *no* press case involving what would otherwise be protected speech under the First Amendment has any other exception received, in any fashion, the *imprimatur* of this Court.

Other prior restraint cases have, of course, reached this Court. But in each such case, the speech or speech plus action involved did not involve the reporting of news. It related, instead, to material which was at least potentially less than fully protected, or was subject to governmental regulation. That was the case, for example, in *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963) and *Times Film Corp.* v. *Chicago,* 365 U.S. 43 (1961), both of which involved alleged obscenity. It was the case in *Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175 (1968) which was alleged to be analogous to a "fighting words" case. And it was the case in *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376 (1973), which involved what has been referred to as "commercial" speech. In none of these cases was the speech involved the traditional stuff of which news is made—the recitation of facts or opinion by the press about matters of public interest or concern.*

* Even in such cases, the protection afforded against prior restraints has been extremely broad. See, *Lovell* v. *Griffin,* 303 U.S. 444 (1938) [ordinance prohibiting distribution by hand or otherwise of literature of any kind without first obtaining permission of City Manager held unconstitutional prior restraint]; *Hague* v. *CIO,* 307 U.S. 496 (1939) [ordinance held void because it allowed previous administrative censorship of speech and assembly in public places]; *Schneider* v. *New Jersey,* 308 U.S. 147 (1939) [municipal ordinance empowering Chief of Police to refuse solicitation permit if "canvasser is not of good character or is canvassing for a project not free from fraud" (*id.* at 149) held invalid as a prior restraint]; *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940) [state statute prohibiting solicitation for religious causes absent a certificate from a designated official held invalid as prior restraint]; *Saia* v. *New York,* 334 U.S. 558 (1948) [municipal ordinance barring use of loudspeakers in public places except with permission of Chief of Police held invalid as prior restraint because it prescribed no standards to guide police discretion and was not "narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound. . . ." (*Id.* at 560)]; *Kovacs* v. *Cooper,* 336 U.S. 77 (1949) [ordinance making it unlawful to operate on city streets a "sound amplifier . . . or any instrument of any kind or character which emits therefrom loud and raucous noises" (*Id.* at 78) upheld as "permissible exercise of legislative discretion" (*Id.* at 87)]; *Kunz* v. *New York,* 340 U.S. 290 (1951) [municipal ordinance giving administrative official discretionary power without appropriate standards to deny right to hold religious meetings on public property held invalid as prior restraint]; *Niemotko* v. *Maryland,* 340 U.S. 268 (1951) [municipal custom requiring permit before meetings could be held in city park held invalid as prior restraint due to "absence of narrowly drawn, reasonable, and definite standards for the officials to follow" (*Id.* at 271)]; *Poulos* v. *New Hampshire,* 345 U.S. 395 (1953) [municipal ordinance construed by State Supreme Court to leave no discretion to licensing officials as to granting licenses for holding religious meetings in public parks upheld as thus construed]; *Staub* v. *Baxley,* 355 U.S. 313 (1958) [municipal ordinance requiring permit to solicit citizens to become members of any "organization, union or society" which requires fees or dues from its members, such permit to be granted or refused based on character of applicant, nature of organization, and effects on general welfare of citizens, held invalid on its face as prior restraint].

Apart from the fact that there has never been adopted any "exception" to the prior restraint doctrine with respect to press reporting about criminal court proceedings, or, indeed, in any area except national security, and the fact that reporting about such proceedings cannot pos-

sibly be considered as "unprotected" speech, there is simply no basis upon which any new exception for such publication should be adopted. In no other area is a party who could be harmed by publication so protected by already existing societal mechanisms—those very devices specified by this Court in *Sheppard.*• Indeed, if recent experience in the area teaches anything, it is that juries are able to deal with highly publicized cases and, where appropriate, to acquit accused defendants whether they are named Joan Little or Angela Davis—or John Connally or John Mitchell.

There is, moreover, a special risk of permitting the imposition of prior restraints on the press in its reporting with respect to the courts. For not only would the courts find themselves in the extremely delicate position of weighing which statements about proceedings before them might be made, but they would be entering restraints on the very institution whose function is to expose governmental wrongdoing in all branches of government, including the judiciary. At its best, the press can be the "handmaiden of effective judicial administration" referred to by the Court in *Sheppard;* at their worst, courts can be instruments of tyranny, as has so often occurred abroad. It is, we submit, the hypothesis of the First Amendment that the press will, often enough, act at its probing, incisive, ubiquitous best; and that it will, often enough, expose wrongdoing and wrongdoers that it must be free, without

• These means will be dealt with at length in petitioners' brief to this Court and we will not repeat the material to be contained therein, with which the *amici* fully agree. We also do not deal separately in this brief with the propriety of the bar placed by the decision of the Nebraska Supreme Court on the reporting of material already disclosed in open court during the preliminary hearing. The *amici* believe that the bar on such publication is plainly contrary to such decisions as *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) and *Estes* v. *Texas,* 381 U.S. 532, 541-42 (1965), as well as to the authorities discussed in this brief, and urge the Court so to hold.

advance censorship, to print as it chooses. This is true despite the recognition that the press has "sometimes been outrageously abusive, untruthful, arrogant and hypocritical." • For it is also the hypothesis of the First Amendment that with all the potential for harm that must be acknowledged in a press as free as exists in this country, the greater risk is governmental misconduct—misconduct that only a press that is free is able to expose.

A few examples may be useful. If a preliminary hearing is held of an alleged leader of organized crime who has confessed to a crime, yet that defendant is freed on his own recognizance, we believe public comment—and immediate public comment—upon the propriety of the magistrate's action may well be proper and societally useful. If a sitting public official is accused of a crime, if the press has knowledge of a confession by him and if that confession is *not* introduced at a preliminary hearing, the press may well serve the public by writing about the hearing and the failure to introduce the confession at that hearing. If a confession is introduced at a preliminary hearing against a defendant and the press has information that it was coerced, it would surely serve the public for the press to publish the information it has about the confession. And if a confession is made at a pre-trial hearing and the press has reason to believe—or to inquire into the possibility—that the other more powerful but thus far unaccused figures may be culpable, the public may well be served by continued public scrutiny of the *bona fides* of the confession. The last hypothetical, of course, is Watergate.

We do not set forth these hypotheticals in any effort to exhaust the range of situations which can arise in which the press may choose—and perhaps wisely choose—to print

• Stewart, "'Or of the Press'", 26 Hastings L.Rev. 631, 636 (1975).

confessions prior to the commencement of criminal trials. Nor do we suggest that the *amici* themselves would react identically and make the same decision as to publication or broadcast in these situations—or that posed in Sutherland, Nebraska. It is the *amici* position, however, that these difficult decisions are editorial in nature and that, like other editorial decisions, they are and must remain matters of "editorial control and judgment". *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974).

Of course, other societies have made other judgments. In most nations in the world, there is no press freedom at all. And even in countries with long-standing democratic traditions there is virtually no press freedom as it is understood and practiced in this country. In England, for example, the system of prior restraint is firmly embedded in history. The Licensing Act of 1662 13 & 14 CAR. 2, c. 33 provided that no person was allowed to print any material unless it was first duly licensed by a state or clerical functionary. Long after the expiration of the Licensing Act, the English courts continued to impose restraints upon publication commenting on court proceedings. In *The King* v. *Clement,* 4 B. & Ald. 218, 106 Eng. Rep. 918 (K.B. 1821), *aff'd, In re Clement,* 11 Price 68, 147 Eng. Rep. 404 (Ex. 1822), for example, the Court held that it had "authority to make any order which they might judge to be necessary in order to preserve the purity of the administration of justice in the course of proceedings then pending before them, and to prohibit any publications which might have a tendency to prevent fair and impartial consideration of the case." *See also The St. James's Evening Post Case,* 2 Atk. 469, 26 Eng. Rep. 683 (Ch. 1742). In modern times, the English courts continue to impose restraints upon publications commenting on court proceedings, even when such court proceedings involve matters of the highest public

importance. Thus, in *Attorney-General* v. *Times Newspapers Ltd.,* [1973] 3 All E.R. 54 (H.L.), a case arising out of the London Times' attempt to report upon its extensive investigation of the national tragedy surrounding the deformities caused to hundreds of children born to mothers who took the drug Thalidomide during their pregnancies, the House of Lords held that the London Times "be restrained from publishing . . . any article or matter which prejudges the issues of negligence, breach of contract or breach of duty, or deals with the evidence relating to any of the said issues arising in any actions pending or imminent against [the drug company which produced and sold Thalidomide in England] in respect of the development, distribution or use of the drug 'Thalidomide'. . . ." *Times Newspapers, supra,* [1973] 3 All E.R. at 87. The House of Lords' ruling is especially striking in view of the fact that the Thalidomide controversy had already been stalled in the English courts at the time of the decision for more than eleven years. So different is the English system from ours that when confronted with such a lengthy delay in the press' ability to inform the public about an issue of such obvious national importance, the House of Lords, per Lord Reid, could still conclude:

> "The purpose of the law [prohibiting publication while a case is *sub judice*] is not to prevent publication of such material but to postpone it." (*Id.* at 66)

Indeed, so different is the English system that the editor of the London Times, Harold Evans, has observed that the Watergate exposures simply could not have been printed in England:

> "We might all reflect: what would have happened in London if, after all, a brave or ignorant editor had published something like that June 1972 report in a

British context? The editor would not have been able to plead that the crime of Watergate reached to the highest in the land. He would not have known. What would have happened after the inevitable prosecution by the Attorney-General, the heavy fine of imprisonment, the reply by the Lord Chief Justice and the scandalized letters to the *Times*? Would other editors have rushed in where one seemed to have blundered? Would the IBA have allowed World in Action to do the same thing? Would the BBC Governors have unleashed Man Alive?

In a word, No." •

• Address by Harold Evans, *The Half-Free Press*, in THE FREEDOM OF THE PRESS 25 (1974). Illustrative of the effects of English law on English journalists are the following passages from the 1975 edition of the book entitled ESSENTIAL LAW FOR JOURNALISTS written by L. McNae and R. Taylor for English journalists.

"45. It cannot be stressed too strongly that, when papers are reporting crime (as opposed to court hearings) the greatest possible care should be taken to discover whether an arrest has been made or is imminent. This will involve stopping the story already prepared—even it has already appeared in early editions—and substituting a 'safe' version.

"46. The story need not be dropped entirely: certain facts are established and their publication could not possibly influence a jury one way or the other.

"47. For instance, it would be safe to report that a cashier had been attacked and knocked unconscious during a raid on a bank; but it would be quite improper to go on to describe his assailants.

• • •

"49. A newspaper can be guilty of 'interfering with judicial proceedings' in publishing a photograph of a 'wanted man', or a man under arrest.

"50. The test is whether any question of formal identification is likely to arise. This is something that an editor is unlikely to be in a position to decide for himself.

"51. The contempt lies in the fact that, at an identification parade or from the witness box, a witness is likely to 'recognize' the man who he has seen in the paper and to identify him as the man he saw committing the crime.

"52. The remedy is to seek the advice of the police and to follow it. If they say that publication would be prejudicial, the picture should not be used." (pp. 91-92)

It is an understatement to observe that the very notion of "safe" stories, of reliance on official advice to avoid legal confrontations, and the like is anathema to American experience and to the First Amendment.

The faults of the English system were recognized early in American history. Madison noted:

> "The freedom of the press and the rights of conscience, those choisest privileges of the people, are unguarded in the British Constitution." 1 MADISON, ANNALS OF CONGRESS 1789-90, 434 (1834).

Madison later declared that ". . . the state of the press . . . under common law cannot be the standard of its freedoms in the United States." 6 MADISON, *Writings of James Madison*, 1790-1802, 387 (1910). Madison emphasized that the "security of the freedom of the press requires that it should be exempt not only from previous restraints by the executive, as in Great Britain, but from legislative restraint also." 4 MADISON, *Writings of James Madison*, 1790-1802, 543 (1910). And, in *Bridges* v. *California*, 314 U.S. 252 (1941), this Court specifically rejected the English system as a source for American jurisprudence.

There is still a further objection to the creation of a second "narrow exception" to the prohibition against prior restraint upon the press. For however narrow the exception, it will be urged as a precedent for the creation of still more exceptions—and urged with some degree of plausibility *unless* what this Court referred to in *Southeastern Promotions* as the "prohibition" against prior restraints is taken to be just that.

Libel is one example. Surely a party who can allege and prove that a libel is about to be printed about him is not irrational in asserting that society is harsh in relegating him to damages and denying him an injunction—regardless of the proof he submits. Yet, since what appears to be the first prior restraint case in American history, *Brandreth* v. *Lance,* 8 Paige Ch. 24 (N.Y. 1839), the courts have consistently held that *no* libel may be enjoined. In that case, the court held—in terms the Nebraska Supreme Court would evidently consider "absolutist" or "extremist" (62a)—that:

> "It is very evident that this court cannot assume jurisdiction . . . [to enjoin an anticipated publication of a libelous pamphlet], or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which, as the Legislature has decided, cannot safely be entrusted to any tribunal consistently with the principles of a free government." (8 Paige Ch. at 26.)

More recent cases concluding similarly include *ABC, Inc.* v. *Smith Cabinet Manufacturing Co.,* 312 N.E. 2d 85 (Ind. Ct.App. 1st Dist. 1974).*

Again, in *Near* v. *Minnesota* itself, the harm which could have been caused by permitting the publication of the racist material there involved, 283 U.S. at 724-26, was evident; the social utility of publication was minimal. None-

* It is a noteworthy aspect of the *ABC* case that although the prior restraint was there ultimately held unconstitutional, it took 291 days from the scheduled broadcast of an enjoined ABC program to the entry of an order in its favor permitting the broadcast. The subject of the program was fire hazards; the enjoined sequence demonstrated that plastic baby cribs burn far more quickly than wooden ones. It was that information that the public did not learn for 291 days due to the prior restraint in effect.

theless, the Court concluded that so clear was the prohibition on prior restraints that the publication by the press could not be enjoined.

There is, in short, no end of plausible reasons for the imposition of prior restraints. And if the courts are to engage in a kind of continual *ad hoc* balancing process, even one which imposes "presumptions" against prior restraints on news reporting, we have no doubt that the courts will have much balancing to do in the years to come. But the effect of that process could only be to limit the amount that is published and broadcast and, ultimately, to deprive the public of much that it should know. The bars that have heretofore existed against prior restraints on publication were designed to avoid precisely those results.

2. The *Sheppard* Decision.

A second misconception of the Nebraska Supreme Court ruling lies in its reliance on *Sheppard* as authority for the imposition of prior restraints on the press. That *Sheppard* should have been so cited reflects what we believe to be a total misunderstanding of what *Sheppard* held. *Sheppard,* while not uncritical of the nature of certain of the articles written by the Cleveland press before and during the Samuel Sheppard trial, set forth a variety of means available to trial judges to assure a defendant his Sixth Amendment rights. The means were varied, ranging from limitations on movement of the press in the courtroom, to the insulation of witnesses from excessive public exposure; the control of releases by police officers, witnesses and counsel; admonitions to the jury to disregard media coverage; the use of *voir dire* to insure avoidance of prejudice to defendant; changing the venue of trials; continuances; sequestration; and finally, where necessary, new trials. What is clear from *Sheppard* is that it does not support

the entry of any direct prior restraints. Indeed, the critical language in *Sheppard* with respect to that issue is the Court's conclusion that:

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. *This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media. . . .*" (384 U.S. at 350; emphasis added.)

A correct later interpretation of *Sheppard* is contained in *Younger* v. *Smith*, 30 Cal.App. 3d 138, 106 Cal.Rptr. 225 (2d Dist. 1973). In that case, a court order barred not only extrajudicial comment by counsel, parties, witnesses and the like with respect to a widely reported murder trial (relating to the murder of a four year old girl) but also the press from "publishing any matters with respect to the present cause except as occur in open court . . ." (106 Cal. Rptr. at 231-32). The California Court of Appeals upheld the restrictions on certain statements being made to the press but held "the direct restraint against the media was impermissible." (106 Cal.Rptr. at 236). In its analysis of *Sheppard*, the California ruling pointed out that in that case this Court had considered a case with far more publicity, much of which was openly hostile to the defendant, and that in spite of all the publicity the Court had "brushed aside any consideration" of sanctions against "a recalcitrant press" on the ground that less drastic measures would "guarantee" Sheppard a fair trial.

A similar analysis is contained in *United States* v. *Dickinson, supra,* which also refers to the fact that:

> "Indeed, the *Sheppard* opinion had specifically declined to 'place any direct limitations on the freedom traditionally exercised by the news media' and had expressly asserted that 'of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom.' In recognition of those dictates the Kaufman Committee's recommendations deliberately eschew any suggestions for direct control of newsmen except in two very carefully delineated situations—(i) the seating of news media representatives so as to minimize disruptive influences during trial and (ii) the televising, photographing, or broadcasting from the courtroom." (465 F.2d at 505)

In short, *Sheppard* lends no support whatever to the proposition that prior restraints may be entered against the publication of news by the press about the courts; indeed, its thrust is quite to the contrary.

3. The *Bransburg* Ruling.

There remains the question of the degree, if any, to which dictum in this Court's *Branzburg* ruling may be relied upon —as did the Nebraska Supreme Court (53a-54a)—to support the issuance of prior restraints against reporting about criminal proceedings. In context, the passage in question reads as follows:

> "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. *Zemel* v. *Rusk*, 381 U.S. 1, 16-17 (1965); *New York Times Co.* v. *United States*, 403 U.S. 713, 728-730 (1971) (Stewart, J., concurring); *Tribune*

Review Publishing Co. v. *Thomas,* 254 F.2d 883, 885 (CA3 1958); *In the Matter of United Press Assns.* v. *Valente,* 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954). In *Zemel* v. *Rusk, supra,* for example, the Court sustained the Government's refusal to validate passports to Cuba even though that restriction 'render[ed] less than wholly free the flow of information concerning that country.' *Id.,* at 16. The ban on travel was held constitutional, for '[t]he right to speak and publish does not carry with it the unrestrained right to gather information.' *Id.,* at 17.

"Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and *they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.* In *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966), for example, the Court reversed a state court conviction where the trial court failed to adopt 'stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested,' neglected to insulate witnesses from the press, and made no 'effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides.' *Id.,* at 358, 359. '[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters. *Id.,* at 361. See also *Estes* v. *Texas,* 381 U.S. 532, 539-540 (1965); *Rideau* v. *Louisiana,* 373 U.S. 723, 726 (1963).

> "It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury." (408 U.S. at 684-85; emphasis added.)

The *amici* submit that the conclusion of the Nebraska Supreme Court that *Branzburg* supports the entry of prior restraints against the press is erroneous. *Branzburg,* of course, was not a prior restraint case. It dealt, as all the opinions in the case were careful to point out, exclusively with the claimed right of journalists not to testify with respect to their communications received from confidential sources. As for the language used by Mr. Justice White quoted above, we believe a far more reasonable interpretation, given the context of the underscored portion, than that provided by the Nebraska decision is that when the press is denied the right to attend court procedings it cannot, *a fortiori,* report about those proceedings. Indeed, a later opinion of Mr. Justice White indicates the correctness of this interpretation. In *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 259 (1974), Mr. Justice White, in his concurring opinion, observed that:

> ". . . According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). A newspaper or magazine is

not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. Cf. Mills v. Alabama, 384 U.S. 214, 220, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). We have learned, and continue to learn, from what we view as the unhappy experience of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficient-sounding the purpose of controlling the press might be, we prefer 'the power of reason as applied through public discussion' and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." (418 U. S. at 259).

We submit that *Branzburg*, which does not refer to the prior restraint doctrine, does not refer in any manner to the "virtually insurmountable barrier between government and the print media", and does not refer to any prior restraint case simply cannot be taken as authority for the overruling of so much of the history of this nation. *Cf. United States* v. *Dickinson, supra* at 507, n. 14. And, to the extent the *Branzburg* dictum is so understood, we believe it is inconsistent with the First Amendment and should, on reflection, be rejected.

CONCLUSION

We have not contended in this brief that the First Amendment must always prevail against all challenges or that there could not arise a difficult conflict between First and Sixth Amendment rights in cases involving access to the courts, statements to the press or even contempt by the

press. Those issues, however, do not arise in this prior restraint case. Here, this Court must decide whether the single most important barrier between the press and the government may be breached—and breached in an area where significant alternative means exist to vindicate the Sixth Amendment rights of defendants. The *amici* urge the Court to reverse the decision of the Nebraska Supreme Court.

Respectfully submitted,

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